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CHARLES ELMORE

No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1929

LUCKENBACH STEAMSHIP COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 12–26) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered February 4, 1929. (R. 26.) The petition for writ of certiorari was filed March 12, 1929 (R. 26), and the writ was granted by this Court on April 29, 1929 (R. 27), under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question involved is whether, for the transportation of mails between ports of the United States and ports in the Canal Zone, that is, spe-

cifically, between New York City and the cities of Cristobal and/or Balboa, during the period from December, 1925, to June, 1926, inclusive, the petitioner was entitled to be paid at rates prescribed by the Postmaster General for the transportation of mails between the United States and a foreign port; or, to state it another way, whether the ports of Cristobal and Balboa within the Canal Zone were foreign ports within the meaning of Section 4009, Revised Statutes, prior to the amendment of said section by the Act of July 3, 1926, and whether the waters of the Panama Canal were waters of the United States within the meaning of said statute.

STATUTES INVOLVED

The following statutes authorize the Postmaster General to make contracts for the transportation of the domestic mail of the United States:

Section 3941, Revised Statutes, as amended by the Acts of March 1, 1881, c. 96, Sec. 1, 21 Stat. 374, and May 12, 1910, c. 230, 36 Stat. 355, 366 (U. S. C. Title 39, Sec. 421):

> Hereafter the Postmaster General shall cause advertisements of all general mail lettings of each State and Territory to be conspicuously posted in each post office named in said advertisements for at least sixty days before the time of such general lettings, and no other advertisements of such lettings shall be required; but this provision shall not apply to any other than general mail lettings.

Section 3943, Revised Statutes, as amended by the Act of May 17, 1878, c. 107, Sec. 5, 20 Stat. 61, 62 (U. S. C. Title 39, Sec. 449):

> And the Postmaster General may contract with the owners or masters of steamships steamboats or other vessels plying upon the waters or between ports of the United States for carrying the mails upon such routes where no mail service has previously been performed, without advertisement for proposals therefor; but no contract for such new service shall be for a longer time than one year. * * *

Section 3949, Revised Statutes, as amended by the Act of May 18, 1916, c. 126, Sec. 6, 39 Stat. 159, 161 (U. S. C. Title 39, Sec. 429):

> All contracts for carrying the mail shall be in the name of the United States and shall be awarded to the lowest bidder tendering sufficient guaranties for faithful performance in accordance with the terms of the advertisement: *Provided, however,* That such contracts require due celerity, certainty, and security in the performance of the service; but the Postmaster General shall not be bound to consider the bid of any person who has willfully or negligently failed to perform a former contract.

Section 4009, Revised Statutes (U. S. C., Title 39, Sec. 654), which authorized the Postmaster General to pay specific rates for the transporta-

tion of mails between the United States and any *foreign* port, is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported.

Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, c. 793, 44 Stat. 900 (U. S. C. App. Title 39, Sec. 654), reads as follows:

> (a) Except as provided in subdivision (b), for transportation of the mails (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel, compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention.

(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of section 4007 of the Revised Statutes or section 24 of the Merchant Marine Act, 1920.

(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails.

TREATY WITH REPUBLIC OF PANAMA

The material provisions of the Treaty between the United States and the Republic of Panama (see Treaties and Proclamations, 33 Stat., Pt. 2, pp. 2234–2235; also Treaties and Acts of Congress Relating to the Panama Canal, 1917, p. 14), which granted to the United States perpetual use, occupation, and control of the Panama Canal Zone, are as follows:

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land

under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

* * * * *

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any of such sovereign rights, power or authority.

STATEMENT

This was a suit in the Court of Claims for recovery of $30,370.94 claimed by the petitioner as the balance due it for transporting various classes of United States mails between the United States and ports in the Canal Zone and/or from ports in the Canal Zone to the United States during the period from December, 1925, to June, 1926, inclusive. (R. 3–7; 10–11.)

For a period of years and continuously to December 1, 1925, the Postmaster General had tendered and the petitioner had accepted and transported "mails of the United States and foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama." Upon approval of the Postmaster General the petitioner had been paid for said services at rates prescribed by the Postmaster General for the transportation by United States steamships of mails between the United States and a foreign port. (Finding IV, R. 10.)

During the period from December, 1925, to June, 1926, inclusive, which is the period involved in this case, the petitioner transported and delivered large quantities of various classes of mails of the United States to "ports at the Panama Canal and/or from ports at the canal to ports in the United States." (Finding V, R. 10.) For said services the Postmaster General prepared accounts and approved

vouchers aggregating $82,851.62 and transmitted the same to the General Accounting Office for direct settlement. The accounts as approved by the Postmaster General were revised by the General Accounting Office to aggregate $52,480.68. The petitioner was paid for said services only the sum of $52,480.68 allowed by the General Accounting Office, or $30,370.94 less than the aggregate sum approved by the Postmaster General. (Finding VI, R. 11.) The amount allowed and paid to the petitioner by the General Accounting Office was determined by comparison with compensation paid under contracts for the transportation of mails entered into under the provisions of Section 3943 of the Revised Statutes, as amended by the Act of May 17, 1878, *supra,* during the period involved (i. e., from December, 1925, to July 1, 1926). (See Sec. 3949 R. S. as amended by the Act of May 18, 1916, c. 126, 39 Stat. 159, 161, *supra;* Finding VI, R. 11.) There being no express contract covering the services for the period involved in this claim it was held by the General Accounting Office that the petitioner was entitled to reasonable compensation only for such transportation, which was determined by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions to be $52,965.41. (Finding VI, R. 11.)

Since July 1, 1926, the petitioner has carried mails of the United States, on vessels of United

States registry, between ports of the United States and the Panama Canal Zone for which it has been allowed and paid compensation at rates prescribed by the Postmaster General for the transportation of mails on United States vessels between ports of the United States and foreign ports, pursuant to the express provisions of the Act of July 3, 1926, c. 793, 44 Stat. 900, amending Section 4009 of the Revised Statutes, which was construed by the General Accounting Office as not being retroactive. (Finding VII, R. 11.)

If the mails transported by the petitioner during the period from December, 1925, to June, 1926, inclusive, should be classified and paid for at rates prescribed by the Postmaster General for the transportation of mails between ports of the United States and a foreign port, as had been done prior to December, 1925, there would be due the petitioner a balance of $30,370.94 for the services performed during said period.

SUMMARY OF ARGUMENT

I. Under the provisions of the treaty between the Republic of Panama and the United States the cities of Cristobal and Balboa in the Canal Zone are ports of the United States.

II. The executive and judicial branches of the Government of the United States have always exercised and are now exercising all the powers and rights of sovereignty within the Canal Zone as are exercised in all other territory or possessions

which are under the control and jurisdiction of the United States.

III. Ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States and not as a foreign country.

IV. For the transportation of mails between the United States and the Canal Zone during the period December, 1925, to June, 1926, the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port.

V. The Act of July 3, 1926, c. 793, 44 Stat. 900, amending Section 4009, Revised Statutes, contains no provision which even impliedly makes it retroactive.

VI. In the absence of a contract specifying the rates to be paid for the services the petitioner is entitled to no more than what they are reasonably worth.

ARGUMENT

I

UNDER THE PROVISIONS OF THE TREATY BETWEEN THE REPUBLIC OF PANAMA AND THE UNITED STATES THE CITIES OF CRISTOBAL AND BALBOA IN THE CANAL ZONE ARE PORTS OF THE UNITED STATES AND THE WATERS OF THE PANAMA CANAL ARE WATERS OF THE UNITED STATES

The President of the United States was authorized to acquire for and on behalf of the United

States perpetual control of a strip of land extending from the Caribbean Sea to the Pacific Ocean, and the right to use the waters thereon, and to excavate, construct, and *to perpetually maintain,* operate, and protect thereon a canal, and *jurisdiction* over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as should be necessary to preserve order and the public health thereon, and to establish such judicial tribunals as might be necessary to enforce such rules and regulations, and for that purpose there was created the Isthmian Canal Commission. (Act of June 28, 1902, c. 1302, 32 Stat. 481.)

Pursuant to the above authority a treaty between the United States and the Republic of Panama to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans was concluded and signed at Washington on November 18, 1903. This treaty was ratified and proclaimed by the President of the United States on February 26, 1904. (Treaties and Acts of Congress Relating to the Panama Canal, 1917, p. 14; 33 Stat. 2234–2235.)

Under the provisions of Article II of that treaty the Republic of Panama granted to the United States in perpetuity the use, occupation, and control of a zone of land and land under water of a width of ten miles across the Isthmus of Panama for the construction, maintenance, operation, sanitation, and protection of the Panama Canal, with the proviso that the cities of Panama and Colon which were

included within the boundaries of that zone, should not be included within the grant; and under the provisions of Article III the Republic of Panama granted to the United States all the rights, powers, and authority within the zone described in Article II which the United States would possess and exercise if it were the sovereign of the territory within which the lands and lands under water are located to the entire exclusion of the exercise by the Republic of Panama of any such rights, power, or authority.

II

THE EXECUTIVE AND JUDICIAL BRANCHES OF THE GOVERNMENT OF THE UNITED STATES HAVE ALWAYS EXERCISED, AND ARE NOW EXERCISING, THE POWERS AND RIGHTS OF SOVEREIGNTY WITHIN THE CANAL ZONE

Subsequent to the ratification of the treaty with the Republic of Panama, the President was authorized to take possession of and occupy on behalf of the United States the territory since known as the Canal Zone. (Act of April 28, 1904, c. 1758, 33 Stat. 429.) By Section 2 of said Act it was provided that until the expiration of the 58th Congress, unless provision for the temporary government should sooner be made by the Congress, all military, civil, and judicial powers, as well as the power to make rules and regulations necessary for the government of the Canal Zone, and all rights, powers, and authority granted by the terms of the Treaty between the United States and the Republic of

Panama, should be vested in such person or persons and should be exercised in such manner as the President should direct for the government of said Zone, and for maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion. Acting under the authority granted in said Acts the President in his Executive Order of May 9, 1904, stated (Panama Canal—Executive Orders 1904–1914, p. 5):

> I have taken possession of and now occupy, on behalf of the United States, the canal zone and public land ceded by the Republic of Panama.
>
> * * * * *

Under authority of said Executive Order, there was enacted by the Isthmian Canal Commission a code of laws for the government of the Canal Zone. (Laws of Canal Zone, 1904–1914, Annotated 1921; Code of Civil Procedure, Canal Zone, 1907.) Under those statutes and Executive Orders, the Commission exercised general governmental authority until March 31, 1914, when it ceased to exist and was succeeded by the permanent organization authorized by the Panama Canal Act. (Act of August 24, 1912, c. 390, 37 Stat. 560.) Under the terms of this Act (Sec. 4; U. S. C. Title 48, Sec. 1305) "the President is authorized * * * to * * * govern and operate the Panama Canal and govern the Canal Zone." By Section 2 (U. S. C. Title 48, Sec. 1309) all laws, orders,

regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Zone and the construction of the Canal were ratified and confirmed as valid and binding until Congress should otherwise provide.

At the time the Act took effect there was a judicial establishment in the Zone which had been set up under Act No. 1 of the Isthmian Canal Commission. (Laws of Canal Zone, 1904–1914, Annotated 1921, p. 9.) By this Act the judicial power of the Government of the Canal Zone was vested in a supreme court, circuit courts, and municipal courts.

Prior to the passage of the Panama Canal Act of 1912 the Government of the Canal Zone was wholly an executive matter. All powers—executive, legislative, and judicial—were vested in the President. He alone, or through those acting by his authority, made, amended, and repealed laws, created and abolished courts, appointed and removed officials, and generally exercised absolute power over the zone. By Executive Order of April 2, 1907 (Panama Canal—Executive Orders 1904–1914, p. 106), the powers of the governor or chief executive of the Zone were vested in the Chairman of the Commission. Upon completion of the Canal this order was changed. Congress assumed the legislative power. While many matters were still left to be regulated by the President, by Section 2 of the Panama Canal Act the power formerly pos-

sessed by the President was abrogated. By Section 4 of the Act the President, when in his judgment the canal should be sufficiently advanced to render further services of the Canal Commission unnecessary, was authorized to discontinue the Commission and complete, govern, and operate the canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone. He was authorized to appoint, by and with the advice and consent of the Senate, a governor at a salary of $10,000 per annum. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Canal and Canal Zone were to be appointed by the President or by his authority, removable at his pleasure, and the compensation of such persons was to be fixed by him or by his authority until Congress should by law regulate the same. (37 Stat. 561.)

By Section 7 of the Act, as amended by the Act of September 21, 1922, c. 370, 42 Stat. 1004 (U. S. C. Title 48, Sec. 1307), the authority of the Governor was defined as follows:

> That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform

> all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing laws. * * *
>
> * * * * *

Under various provisions of the law now contained in Title 48 of the United States Code, the President is authorized to grant leases of public lands in the Zone (Section 1308); to make rules and regulations in matters of sanitation, health, and quarantine (Section 1310); to make and change rules and regulations for levying, assessing, and collecting ad valorem, excise, license, and franchise taxes (Section 1311); to make and enforce rules and regulations for the public roads and highways and for regulating, licensing, and taxing the use and operation of automobiles (Section 1312); to make rules and regulations to assert and exercise police power in connection with breaches of the peace or disorderly, indecent, or immoral conduct within the Zone (Section 1313); to make regulations for the operation of the Canal and the locks and approaches thereto (Section 1318); to provide a method for adjustment of claims arising out of personal injuries to employees (Section 1320); to

make rules and regulations touching the right of persons to enter or remain upon or pass over any part of the Canal Zone (Section 1321); to erect, maintain, and operate radio communications, dry docks, repair shops, yards, docks, wharves, etc., all moneys received from such operations to be subject to the provisions of existing law relating to the *deposit of other public funds of the United States* (Section 1323); to determine what towns shall exist in the Canal Zone and to subdivide said Zone into subdivisions to be designated by name or number and to clearly define their boundaries (Section 1341).

In the place of the courts created by the President, acting through the Commission, Congress created and established courts and defined their jurisdiction. (Act of September 21, 1922, c. 370, Section 1, 42 Stat. 1004.) The jurisdiction and procedure in admiralty in the District Court of the Canal Zone is the same as in the United States District Courts. (Sec. 8, Panama Canal Act, as amended by Act of 1922, Sec. 2, 42 Stat. 1005; U. S. C. Title 48, Sec. 1345.) The Circuit Court of Appeals for the Fifth Circuit has jurisdiction to review final judgments of the district court in all cases in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, in cases in which the value in controversy exceeds $1,000, in felony cases, and in cases in which the jurisdiction of the trial court is in issue. Such appellate jurisdiction is subject

to review by this Court, as in other cases, and is exercised by the Circuit Court of Appeals in the same manner as in reviewing final judgments of the District Courts of the United States. (Sec. 9, Panama Canal Act, as amended by Act of 1922, Sec. 3, 42 Stat. 1006; U. S. C. Title 48, Sec. 1356.) The district judge, district attorney, and the marshal are appointed by the President, by and with the advice and consent of the Senate of the United States, for a term of four years each and until their successors are appointed and qualified. (Sec. 8, Panama Canal Act, as amended by Act of 1922, Sec. 2, 42 Stat. 1006; U. S. C. Title 48, Sec. 1353.)

We submit that in view of these numerous and unequivocal evidences of the absolute dominion and control of the United States over the Canal Zone it can not reasonably be asserted that its two cities, Cristobal and Balboa, are for *any purpose* to be regarded as *foreign ports,* nor are the waters of the Panama Canal to be regarded otherwise than as waters of the United States.

III

EVER SINCE IT WAS ACQUIRED, THE CANAL ZONE HAS BEEN CONSIDERED AND TREATED BY THE LEGISLATIVE BRANCH OF THE GOVERNMENT AS A POSSESSION OF THE UNITED STATES AND NOT AS A FOREIGN COUNTRY

In the Act relating to the liability of common carriers by railroad to their employees it is provided—

> That every common carrier by railroad in the Territories, the District of Columbia, the

> Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions * * *. * * * (Act of April 22, 1908, c. 149, Sec. 2, 35 Stat. 65; U. S. C. Title 45, Sec. 52.)

In the Act known and referred to as the "White Slave Traffic Act" it is provided "That the term 'Territory' as used in this Act shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone." (Act of June 25, 1910, c. 395, Sec. 7, 36 Stat. 825, 827; U. S. C. Title 18, Sec. 403.) In the Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government thereof, it was enacted—

> That all laws and treaties relating to the extradition of persons accused of crime in force in the United States * * * and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States. (Panama Canal Act of August 24, 1912, c. 390, Sec. 12, 37 Stat. 560, 569; U. S. C. Title 48, Sec. 1330.)

In the National Defense Act, relating to the number of the National Guard of the United States, it

was enacted that "*Provided further,* That the word Territory as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone." (Act of June 3, 1916, c. 134, Sec. 62, 39 Stat. 166, 198.) In the Naval Appropriation Act, 1918, Congress enacted that "the words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States." (Act of March 4, 1917, c. 180, 39 Stat. 1168, 1193.) In Section 1 of Title XIII, General Provisions, of the Espionage Act, it is enacted that "the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of June 15, 1917, c. 30, 40 Stat. 217, 231; U. S. C. Title 50, Sec. 40.) In the Trading with the Enemy Act, it is provided: "The words 'United States,' as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof." (Act of October 6, 1917, c. 106, Sec. 2, 40 Stat. 411, 412.) In the Sabotage Act, it is provided: "The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States." (Act of April 20, 1918, c.

59, Sec. 1, 40 Stat. 533, 534; U. S. C. Title 50, Sec. 101.) In the Act restricting travel during the war, it is provided: "That the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of May 22, 1918, c. 81, Sec. 4, 40 Stat. 559; U. S. C. Title 22, Sec. 226.) In the Act for requisition of vessels, it is provided: "The term 'United States' includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States." (Act of July 18, 1918, c. 157, Sec. 1(a), 40 Stat. 913.) The provisions of the National Prohibition Act were made applicable to the Canal Zone. (Act of October 28, 1919, c. 85, Sec. 20 of Title III, 41 Stat. 305, 322; U. S. C. Title 27, Sec. 63.) In the Act to regulate the entry of aliens into the United States, Congress provided: "That the term 'United States' as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of November 10, 1919, c. 104, Sec. 3, 41 Stat. 353, 354.)

By virtue of the authority vested in him by Section 3 of the Panama Canal Act of 1912 (37 Stat. 561; U. S. C. Title 48, Sec. 1304), in an Executive Order of December 5, 1912, the President of the United States declared all land and land under water within the limits of the Canal Zone to be

necessary for the construction, etc., of the Panama Canal, and directed the Isthmian Canal Commission to take possession, on behalf of the United States, of all such land and land under water and to extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy thereof. (Panama Canal—Executive Orders 1904–1914, p. 280.) Subsequently, Congress passed an Act removing a certain tract or lots of land situated in the town of Cristobal in said Canal Zone, and authorized the Panama Canal Railroad Company to sell, transfer, and convey said lots or tracts of land with all improvements thereon to any person or persons or association of persons and retain the consideration therefor for its own use. (Act of June 5, 1920, c. 239, 41 Stat. 948.) In the Act relating to the landing and operation of submarine cables in the United States it is provided: "That the term 'United States' as used in this Act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States of America." (Act of May 27, 1921, c. 12, Sec. 5, 42 Stat. 8; U. S. C. Title 47, Sec. 38.)

Attention is also called to Section 9 of the Act of August 21, 1916, c. 371, 39 Stat. 527, 529; U. S. C. Title 48, Sec. 1331, conferring special powers on the shipping commissioner and deputy shipping commissioners in the Panama Canal Zone.

The petitioner's contention (Brief, p. 7) that the Canal Zone ports are not ports of the United States,

but are "foreign ports" within the meaning of Section 4009 of the Revised Statutes, is not supported by the provisions of Articles II and III of the Treaty between the United States and the Republic of Panama, or by the course of legislation in Congress since the Canal Zone was acquired by the United States.

"A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." *De Lima* v. *Bidwell,* 182 U. S. 1, 180. When the treaty between the Republic of Panama and the United States was ratified the Canal Zone ceased to be a "foreign country." *De Lima* v. *Bidwell, supra,* p. 196. It has been settled that Congress may acquire territory without incorporating it into the United States as an integral part thereof, and that until Congress shall see fit to incorporate territory ceded by treaty to the United States the territory so acquired shall be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation. *Rassmussen* v. *United States,* 197 U. S. 516, 520. See also *Downes* v. *Bidwell,* 182 U. S. 244, 268.

The Treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all the rights, power,

and authority in and over the strip of land and lands under water which it could possess as the sovereign thereof, to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

Sovereignty is a political question. In *Jones* v. *United States,* 137 U. S. 202, 212, it is said that the question "who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." (See also *Pearcy* v. *Stranahan,* 205 U. S. 257, 265, 273.)

The petitioner contends (Brief, p. 14) that because certain officers of the United States have for a long time considered and treated the Canal Zone as "foreign" that construction should not now be disturbed. In answer to this contention, we think it sufficient to say that the fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States and treat it as anything but a possession of the United States is not conclusive of its status as a territorial possession of the United States. It is true that beginning with the decision in *Downes* v. *Bidwell,* 182 U. S. 244, this

Court has drawn a distinction in the application of the Constitution and Federal statutes between the organized territory of the United States and its possessions, and has in effect held that the Constitution and general statutes may not apply to its "possessions" or that they have a different application to its "possessions" than they have to the "territory of the United States." Consequently, various statutes, the enforcement of which is particularly within the jurisdiction of certain officers, may be so construed as in effect to treat a "possession of the United States" on the basis of "foreign" territory merely because it is neither affirmatively nor impliedly included in the particular statute, or statutes that may be properly enacted which effectively deal with such possessions on a distinctly different basis from that of the continental United States or of its territory. It can not be conceded, however, that these circumstances necessarily establish that the Canal Zone is not a possession of the United States, because, as has already been pointed out, Congress has enacted various statutes specifically applicable to the Canal Zone and which deal with it as a "possession of the United States."

The petitioner relies upon certain decisions and opinions of the Attorney General (Brief, p. 4) in support of its contention that "the contemporaneous and continued practical construction * * * 'for a period of years and continuously to December

1, 1925,' should not be departed from to the unsettlement of rights acquired under this construction." An examination of the opinion of the Attorney General (29 Op. 194, 196) shows that he merely concurred in the view that in order to obviate serious loss of time in the transportation of mails under contract between the United States and the ports of *Panama* and *Colon* in the Republic of Panama, the transferring of such mails to tenders in the harbors of Cristobal and Balboa in the Canal Zone to be thus transported to the ports of Panama and Colon in the Republic of Panama "unquestionably would be carrying the mails to a foreign port."

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which for all practical purposes conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of this Court in the case of *Wilson* v. *Shaw*, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. This Court said (pp. 32, 33):

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal." By article 3, Panama "grants to the United States all the rights, power and authority within the zone mentioned and described in article 2 of this agreement * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. *It is hypercritical to contend that the title of the United States is imperfect,* and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate. (Italics ours.)

IV

FOR THE TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND THE CANAL ZONE DURING THE PERIOD DECEMBER, 1925, TO JUNE, 1926, THE POSTMASTER GENERAL WAS NOT AUTHORIZED TO PAY COMPENSATION BASED UPON RATES APPLICABLE TO TRANSPORTATION OF MAILS BETWEEN THE UNITED STATES AND A FOREIGN PORT

The authority to pay the rates contended for by the petitioner is found in Section 4009 of the Revised Statutes, which is as follows:

> For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported.

From what has already been said with respect to the status of the cities of the Canal Zone as ports of the United States, we think it has been shown that there is no merit in the contention of the petitioner that for the transportation of mails between the United States and the Canal Zone it should be compensated at rates applicable to the transportation of mails between the United States and a foreign port, and that there seems to be no necessity for any further discussion of this point.

The petitioner contends (Brief, p. 18) that because the Postmaster General for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed. We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (*Peirce* v. *United States,* 1 C. Cls. 270; *The Floyd Acceptances,* 7 Wall. 666.) In the case of *Houghton* v. *Payne,* 194 U. S. 88, it is stated (pp. 99–100) that—

> it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham,* 110 U. S. 219; *United States* v. *Finnell,* 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the postitive language of the statute. * * *

V.

THE ACT OF JULY 3, 1926, 44 STAT. 900, AMENDING SECTION 4009, REVISED STATUTES, CONTAINS NO PROVISION WHICH EVEN IMPLIEDLY MAKES IT RETROACTIVE

The petitioner contends (Brief, p. 22) that Section 4009, as amended, was not only law for the future but that it was a declaratory statute designed and intended to declare what was the true meaning of the old law, and in effect that it is retroactive. It has been uniformly held that unless the intention that a law is to have a retrospective operation is clearly evidenced in the law and its purposes the courts will presume that it was enacted for the future and not for the past. In *White* v. *United States,* 191 U. S. 545, this Court said (p. 552):

> Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past. * * *

The Government contends that while Section 4009, Revised Statutes, as amended by the Act of July 3, 1926, authorized the Postmaster General to allow compensation not in excess of the amount of postage collected on mail transported on vessels of the United States between the United States and its

possessions, it had no retroactive force and therefore did not authorize the payment of compensation claimed by the petitioner for the service performed during the period December, 1925, to June, 1926, and that all prior claims should be adjusted in accordance with the provisions of law in force and effect at the time the services were performed.

A declaratory Act directing how a former Act shall be construed is inoperative as to the past although it is controlling as to the future. *United States* v. *Claflin,* 97 U. S. 546.

A statute is not made retroactive merely because it draws upon antecedent facts for its operation. *Cox* v. *Hart,* 260 U. S. 427.

A statute is presumed not to have been meant to act retroactively and should never receive such a construction if it is susceptible of any other, or unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. *U. S. Fidelity Co.* v. *Struthers Wells Co.,* 209 U. S. 306, 314.

VI

IN THE ABSENCE OF A CONTRACT SPECIFYING THE RATES TO BE PAID FOR THE SERVICES, THE PETITIONER IS ENTITLED TO NO MORE THAN WHAT THEY ARE REASONABLY WORTH

Prior to July 3, 1926, the compensation for transporting the mail between the United States and its

possessions was required to be fixed by contract. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The petitioner has not seen fit to offer any evidence to prove that the amount allowed and paid (R. 11) by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the petitioner can not recover the amount claimed in this cause or any other sum.

In *United States* v. *Moore,* 95 U. S. 760, the plaintiff, who was a passed assistant surgeon in the Navy, demanded payment from the date of his original appointment as an assistant surgeon. This Court approved the view of the Navy Department that he was only entitled to the increased pay beginning five years after date of his appointment as a passed assistant surgeon and not five years from the date of his original appointment as an assistant surgeon. Clearly this case is not in point.

The case of *United States* v. *Johnston,* 124 U. S. 236, does not support petitioner's contention because in the instant case no settled accounts were reopened and set aside by the accounting officers.

In the case of *Alabama Great Southern Railroad v. United States,* 25 C. Cls. 30, affirmed in 142 U. S. 615, the question was whether Congress could set a limit to the responsibility of the Government for transporting the mails over the nonland-grant portions of claimant's railroad. Payments which had been made by previous Postmasters General for transportation of the mails over such roads to the extent that they were land-aided in whole or in part, were reopened by a succeeding Postmaster General many years after the services had been performed and orders were issued that the previous payments should be adjusted on a mileage basis which extended the land-grant obligation of the carriers to the entire length of their railroads in accordance with his interpretation of the Act of July 12, 1876, c. 179, Sec. 13, 19 Stat. 78, 82. Deductions were accordingly made from current accounts of the carriers to recoup the amounts which he determined had been overpaid for the services. In the instant case the Postmaster General certified the accounts for payment in accordance with his interpretation of Section 4009 for the period involved in this case. The Comptroller General merely refused to pay the amount certified by the Postmaster General for the reason that said amounts were not authorized by Section 4009. The Comptroller General did not disturb any payments that had been made on the certification of the Postmaster General prior to

December 1, 1925. Clearly this case is not in point.

It seems that *McCann* v. *United States,* 18 C. Cls. 445, supports the contention of respondent because in that case it was also decided that where it is shown that a voucher given for work done without a specified contract price is in fact for a sum larger than the value of the services performed, the claimant can not recover beyond the actual value, and if he has been paid that amount he can recover no more.

The question decided in *United States* v. *Jones,* 18 How. 92, certainly has no bearing on the question involved in this case because it is now provided by Section 236, Revised Statutes, as amended by the Act of June 10, 1921, c. 18, Sec. 305, 42 Stat. 20, 24 (U. S. C. Title 31, Sec. 71), and by Section 304 of the latter Act, that all claims and demands whatsoever by the Government of the United States or against it shall be settled and adjusted in the General Accounting Office and that any balances certified by that office shall be final and conclusive upon the executive branches of the Government.

CONCLUSION

For the reasons above set forth it is submitted that the question involved in this suit has been correctly decided in accordance with the facts found by the Court of Claims and the decisions of this

Court. The judgment of the Court of Claims, therefore, should be affirmed.

Respectfully submitted.

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